TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 172.

THE UNITED STATES, APPELLANT,

vs.

THE COMMONWEALTH TITLE INSURANCE AND TRUST COMPANY, TRUSTEE.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 16, 1903.

(18755.)

16155

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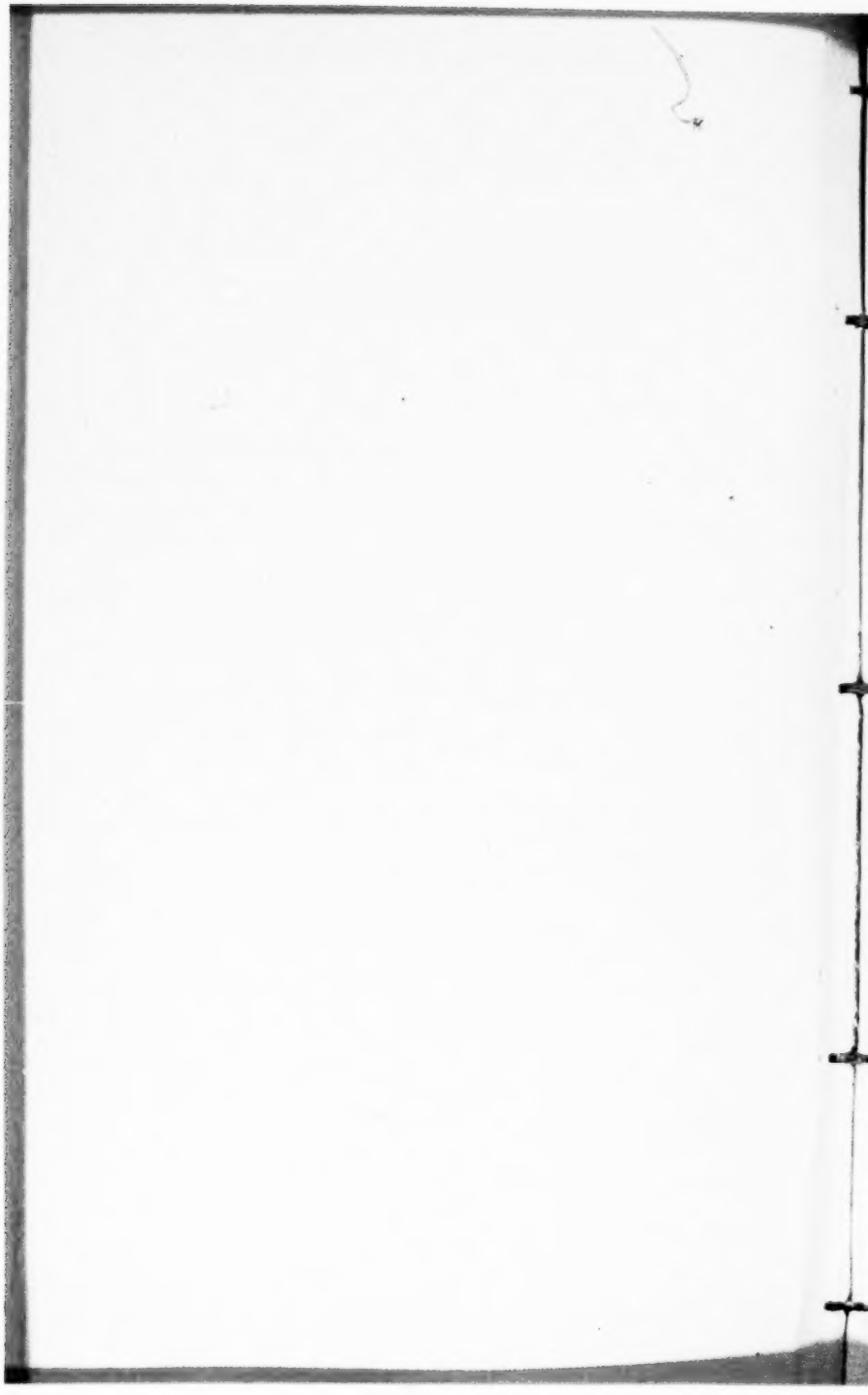

16156

1 Court of Claims.

THE COMMONWEALTH TITLE, INSURANCE AND Trust Company, trustee, *vs.* THE UNITED STATES. } No. 22414.

I. Petition. Filed November 26, 1900.

To the honorable the chief justice and judges of the Court of Claims:

The petition of The Commonwealth Title, Insurance and Trust Company, trustee, respectfully showeth to the court the facts following:

1. The claimant is a corporation created and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, doing business in the city of Philadelphia, in said State; and as such is a citizen of the United States.

2 2. As will more fully appear from Exhibits A, B, and D, hereto appended—and hereinafter specifically referred to, one Amanda Cormack made settlement on the east half of the southeast quarter of section twenty-one, and the north half of the northeast quarter of section twenty-eight, town twenty north of range five east, Helena land district, Montana, on the 25th of October, 1888; and resided thereon continuously until the 30th of April, 1890, when she made final proof which was accepted on the 9th of May of that year, and final receipt and certificate issued to her. On the 10th of May, 1890, she obtained a loan of three hundred dollars from the Northwestern Guaranty Loan Company, and executed and delivered to said company a mortgage for that amount upon the land above mentioned as security for said loan. On June 9th, 1890, the said mortgage was assigned for full value to the claimant as trustee. On January 9th, 1891, the land office informed the registrar and receiver at Helena that the land in question, with other lands, was reserved for the Box Elder reservation system, and the preemption cash entry of Cormack was therefore held for cancellation as illegal. All the lands in sections 21 and 28, town 20, were afterwards released from the reservoir selection, except the east half of the southeast quarter of section 21 and the east half of the northeast quarter of section 28, which were held to be actually necessary for the construction and maintenance of reservoirs. This included three of the forties covered by the cash entry of Cormack, leaving only one of her forties, to wit, the northwest quarter of the northeast quarter of section 28, open to settlement and entry. On August 16th, 1894, the land office cancelled the entry as to the three forties in conflict as above set forth.

3. As appears from the decision of the Land Office Commissioner, under date of October 27, 1897, a copy of which is hereto appended, marked Exhibit A, notice was given on February 7, 1896, of the suit of the claimant as trustee vs. Amanda Cormack, to foreclose said

3 mortgage. On April 29, 1896, the decree of the United States district court, eighth judicial district, was rendered, wherein it was adjudged and decreed "That the mortgaged premises mentioned in said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due plaintiff, as hereinafter ascertained and

determined, * * * be sold at public auction by or under direction of the sheriff of said Cascade County, and that the sheriff give public notice of the time and place of such sale according to the practice of this court and the law relating to the sale of real estate under execution; that the sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions, and pay to the plaintiff or its attorney out of said proceeds, its costs in this suit taxed at $26, the sum of $40 fixed and allowed by this court as a reasonable attorney's fee, and also the amount so found due plaintiff as aforesaid, the sum of $385, with interest upon each of said amounts, to be paid to plaintiff at ten per cent from date of this decree, or so much thereof as said proceeds of sale will pay of the same; that each of defendants and all persons claiming or to claim from or under them or any of them, and all persons having liens subsequent to said mortgage, and all persons claiming to have acquired any estate or interest in or to said premises subsequently to the filing of the complaint in this cause be forever barred and foreclosed of and from all equity of redemption in, of, and to said mortgaged premises and every part and parcel thereof after the delivery of the sheriff's deed or deeds."

Sale was made accordingly, and claimant became the purchaser at the price of $230. Deed was executed and delivered to claimant in due course.

4. An act of Congress, approved June 16th, 1880 (21 Stat. L., 287, also Supp. Rev. Stat., 2nd ed., p. 300, chap. 244), entitled "An act for the relief of certain settlers on the public lands, and to provide for the payment of certain fees, purchase money, and commissions paid on void entries of public lands," provides, inter alia, as follows:

"SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where from any cause the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made the entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double minimum price for land which was afterwards found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof or to his heirs or assigns."

5. The Hon. Binger Hermann, Commissioner of the General Land Office, issued on January 3d, 1898, rules governing the practice under the said act, as to applications for the repayment of purchase money, inter alia as follows:

"Where the title has become a matter of record, and in all cases where patent has issued, a duly executed deed, relinquishing to the United States all right and claim to the land under the entry or patent, must accompany the application. This deed must be duly recorded, and a certificate must also be produced from the proper recording officer where the land is situated showing that said deed is so recorded, and that the records of his office do not exhibit any other conveyance or encumbrance of the title to the land."

6. The claimant has made application in due course and form, and has complied with the said statute, and with the said rules, to the satisfaction of the Land Office, and all other the offices to whose notice the matter has come in order; but the Commissioner of the General Land Office, who first passed thereon, rejected the claim (see Exhibit A), holding that the claimant was not an "assignee" within the meaning of the said statute authorizing the repayment of purchase money.

5 7. Claimant thereupon appealed to the Secretary of the Interior, who reversed the decision of the Commissioner (see copy of letter written by Hon. Thomas Ryan, Acting Secretary, dated March 21st, 1899, hereto appended, marked Exhibit B), and the latter on July 24th, 1899 (see Exhibit C), notified the claimant that the papers in the case had been transmitted to the Treasury Department for final settlement. Pending this last notification, claimant had forwarded to the Land Office a duly recorded deed conveying its title to said land to the United States, together with the required certificate as to such record and as to conveyances and incumbrances, both of which were accepted by said office as satisfactory and sufficient.

8. The Auditor for the Interior Department passed favorably upon the claim, and transmitted his favorable decision to the Comptroller of the Treasury, who on October 7th, 1899 (see Exhibit D), reversed the decision of the Auditor, and for the same reason which had been given in the first place by the Commissioner of the General Land Office, held that the claimant was not entitled to receive the refund of the purchase money.

9. Claimant has complied, as above stated, to the satisfaction of the Government, with every preliminary requisite to repayment, and the only point in issue between claimant and defendant is this: Is the claimant, or not, an assign, or assignee, of the purchaser, within the meaning of the said statute, and as such entitled to a return of the purchase money on a retaking of the land by the Government?

10. The claimant, as trustee aforesaid, is the only person owning or interested in the claim above set forth, and no assignment or transfer of the said claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to receive and recover from the
6 United States the sum of one hundred and fifty dollars (150), being at the rate of $1.25 per acre for one hundred and twenty acres of land. The claimant has always borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the said Government, and believes all the matters hereinabove set forth to be true.

Wherefore the claimant prays for judgment against the United States in the sum of one hundred and fifty dollars ($150), and for such further relief as this honorable court may be entitled to grant in the premises.

THE COMMONWEALTH TITLE, INSURANCE,
AND TRUST COMPANY, *Trustee*,
By HENRY M. DECHERT, *President*.

Attest:
W. F. KLING, *Secretary*.

WALTER C. RODMAN,
Attorney for Claimant.

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

W. F. KLING, being duly sworn, says that he is the secretary of the Commonwealth Title, Insurance, and Trust Company, the claimant (as trustee) named in and who subscribed the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 26th day of May, A. D. 1900.

W. F. KLING, *Notary Public.*

7

EXHIBIT A.

"M"
1897–44354.
J. L.

G. R.
F. W. A.
J. W. W.

Address only the
Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 27, 1897.

Mr. WALTER C. RODMAN,
Attorney at Law, Philadelphia, Penna.

SIR: I am in receipt of your letter of the 13th inst., transmitting an abstract of title in connection with the application of the Commonwealth Title, Insurance, and Trust Co. for repayment of purchase money paid by Amanda Cormack on May 9, 1896, for the E. ½ of SE. ¼, sec. 21, and NE. ¼ of NE. ¼, sec. 28, said tracts being a portion of Helena, Montana, cash entry No. 4096 for the N. ½ of NE. ¼, sec. 28, and E. ½ of SE. ¼, sec. 21, T. 20 N., R. 5 E.

This entry was canceled in part by office letter "G," August 16, 1894, because of conflict with the Box Elder Reservation System.

The abstract of title shows that Amanda Cormack mortgaged this land on May 12, 1890, for $300.00 to the Northern Guaranty Loan Co., of Minneapolis, Minn., and that on June 9, 1890, said company assigned said mortgage to the Commonwealth Title, Insurance, and Trust Co., of Philadelphia, Penna., trustee.

On February 7, 1896, notice was given of the suit of the Commonwealth Title, Insurance, and Trust Co. vs. Amanda Cormack to foreclose said mortgage. On April 29, 1896, the decree of the U. S. district court, 8th judicial district, was rendered, wherein it was adjudged and decreed—

8 "that the mortgaged premises mentioned in said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due plaintiff, as hereinafter ascertained and determined, * * * be sold at public auction by or under direction of the sheriff of said Cascade County, and that the sheriff give public notice of the time and place of such sale according to the practice of this court and the law relating to the sale of real estate under execution."

"That the sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions, and pay to plaintiff or its attorney out of said proceeds its costs in this suit, taxed at $26, the sum of $40, fixed and allowed by this court as a reasonable attorney's fee, and also the amount so found due plaintiff, as aforesaid, the sum of $385, with interest

upon each of said amounts, to be paid to plaintiff at 10 per cent from date of this decree, or so much thereof as said proceeds of sale will pay of the same."

"That each of defendants and all persons claiming or to claim from or under them, or any of them, and all persons having liens subsequent to said mortgage, and all persons claiming to have acquired any estate or interest in or to said premises subsequently to the filing of the complaint in this cause be forever barred and foreclosed of and from all equity of redemption in, of, and to said mortgaged premises and every part and parcel thereof from and after the delivery of the sheriff's deed or deeds."

The order of sale issued on April 29, 1896, and on August 16, 1897, the sheriff sold the land to the Commonwealth Title, Insurance and Trust Co. for $230, in conformity therewith.

The applicants claim the right to repayment under this entry as the assignee of Amanda Cormack.

Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law. (Repayment circular of August 6, 1880.)

The applicants took the title to this land by sheriff's deed on August 16, 1897. The entry was canceled, as to the tracts on which repayment is asked, on August 16, 1894.

Hence the applicants are not assignees within the meaning of the statute authorizing repayment of purchase money.

The Department also holds that a mortgagee whose claim is merely a lien on the land is not an assignee of the entryman and as such entitled to repayment. (15 L. D., 392, and 11 L. D., 283.)

I am, therefore, constrained to hold that the applicants are not the proper parties to make application for repayment under this entry.

The application is accordingly denied.

If the correctness of this decision is doubted, I have to inform you of your right to appeal to the honorable Secretary of the Interior through this office.

Very respectfully, BINGER HERMANN,
Commissioner.

9 EXHIBIT B.

Vol. 25, No. 1093.

DEPARTMENT OF THE INTERIOR,
Washington, March 11, 1899.

In re Commonwealth Title, Insurance and Trust Company. Repayment.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

SIR: This is an appeal by the Commonwealth Title, Insurance and Trust Company, of Philadelphia, Pennsylvania, from your office decision of October 27, 1897, denying its application for repayment of the purchase money paid by Amanda Cormack on the E. ½ of the SE. ¼ of sec. 21 and the NE. ¼ of the NE. ¼ of sec. 28, being a part of her cash

entry No. 4096 for the E. ½ of the SE. ¼ of sec. 21 and the N. ½ of the NE. ¼ of sec. 28, T. 20 N., R. 5 E., Helena land district, Montana.

The facts as to this entry are set forth in departmental decision of April 5, 1894 (18 L. D., 352), in the case of said Amanda Cormack, from which it appears that she made settlement on the land embraced in her entry October 25, 1888, and continued to reside thereon until April 30, 1890, when she made final proof. Her proof was accepted May 9, 1890, and final receipt and certificate issued to her.

January 8, 1890, the township embracing the land in question was selected and recommended for reservoir purposes, and July 8, 1890, your office advised the local office of that fact.

May 10, 1890, Cormack obtained a loan of three hundred dollars from the Northwestern Guaranty Loan Company, of Minneapolis, Minnesota, and as security therefor executed and delivered to the company a mortgage deed upon the land embraced in her entry. June 9, 1890, the said company assigned this mortgage to the Commonwealth Title, Insurance and Trust Company aforesaid.

10 January 9, 1891, your office informed the local office "that the land in question, with other lands, was reserved for the Box Elder reservation system, and that the preemption cash entry of Cormack was therefore held for cancellation as illegal."

Cormack appealed, and the Northwestern Guaranty Loan Company filed a petition praying "that a time and place be fixed for a hearing on this petition and that your petitioner and the said Amanda Cormack as well may be granted an opportunity to show cause why the entry of the said Amanda Carmack may not be cancelled."

In the decision referred to it was held that, as the selection of the land in question was made in conformity with the acts of Congress, the Department was without authority to grant the relief demanded by Cormack or to order the hearing petitioned for by the Northwestern Guaranty Loan Company." Your office decision of January 9, 1891, with certain modifications as to the description of the land, was accordingly affirmed.

August 16, 1894, your office canceled the part of Cormack's entry in conflict with the Box Elder reservation system.

April 29, 1896, in a suit brought by the Commonwealth Title, Insurance and Trust Company against Amanda Cormack for the foreclosure of said mortgage, the district court for Cascade County, Minnesota, the county in which the land is situated, rendered a decree directing that said land should be sold to satisfy said mortgage indebtedness. In accordance with this decree the land was sold, the said company becoming the purchaser and receiving a sheriff's deed for the land.

The Commonwealth Title, Insurance and Trust Company now applies for repayment as the assignee of Amanda Cormack. Section 2 of the act of June 16, 1880 (21 Stat., 287), is as follows:

"In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter

11 be canceled for conflict, or where from any cause the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assignees, the fees and commissions, amount of purchase money, and excess paid upon the same, upon the surrender of the dupli-

cate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office."

Your office denied the company's application on the ground that said company is not an assignee within the meaning of the repayment statute, because it took title to the land covered by Cormack's entry after the cancellation of said entry. This ruling is based upon that portion of departmental circular of August 6, 1880, which declares that "those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof." It was also held by your office that the mortgage deed given by Cormack created merely a lien on the land, and that the mortgagee, therefore, is not an assignee of the entryman.

In departmental decision of April 5, 1894, supra, it was held that the selection of the land in question for reservoir purposes was controlled by the act of October 2, 1888 (25 Stat., 526), and that under said act such selection operated retrospectively to reserve the land from entry, settlement, and occupation from the date of the act. As Cormack did not make settlement until October 25, 1888, and as the selection of the land for reservoir purposes operated to withhold it from entry, settlement, and occupation from the time when the act was passed (October 2, 1888), and thereby avoided Cormack's subsequent settlement and entry, it seems to have been held that her entry was erroneously allowed and could not be confirmed, and it was therefore canceled. The case is thus one in which repayment is authorized by the statute, the only question being
12 as to whether the company making application therefore is an assignee within its terms.

The facts in the case of California Mortgage, Loan and Trust Company (on review), 26 L. D., 425, are similar to those in the case under consideration. In that case William B. Stewart's pre-emption cash entry was canceled because the land covered thereby had been, by Executive order, reserved from entry for the benefit of the Mission Indians. Prior to the cancelation of his entry the California Mortgage, Loan and Trust Company had loaned Stewart one thousand dollars, taking a mortgage upon the land embraced in said entry to secure payment. After cancellation of his entry, in furtherance of the mortgage Stewart gave the company a deed to the land and an assignment of his claim against the United States for repayment of the purchase money. In rendering decision the Department concluded as follows:

"It is believed that the California Mortgage, Loan and Trust Company is such an assignee. If it be conceded that a mortgagee is not an assignee within the meaning of this statute, and that the right of repayment is restricted to assignees of the land and does not extend to assignees of only the claim for money paid; and if it be conceded that the right of repayment is acquired by an assignee whose interest in the land is not obtained until after the cancellation of the entry, it does not follow that the claim of this company should be denied. Inasmuch as the deed executed by Stewart to the company in 1894 grew out of and was the consummation of the mortgage transaction, it should be treated as giving

additional effect to the mortgage, which antedated the cancellation of the entry, and as converting the mortgage lien into a claim to the land itself in so far as Stewart or any assignee of his could have such a claim after cancellation of the entry."

In the case at bar Cormack obtained the loan and executed and delivered the mortgage deed as security therefor to the Northwestern Guaranty Loan Company after the entry and prior to its cancellation.

13 By assignment of the mortgage the Commonwealth Title, Insurance and Trust Company succeeded to the rights of the Northwestern Company, and this was also effected prior to the cancellation of Cormack's entry. The foreclosure of the mortgage and the delivery of the sheriff's deed "grew out of and were the consummation of the mortgage transaction." The mortgage lien thus ripened into a claim to the land itself—a claim initiated prior to the cancellation of Cormack's entry. It is apparent that, had there been no failure of Government title, the land, under the foreclosure, would have gone to the Commonwealth Company as assignee. Said company is therefore entitled to repayment in this case.

The repayment statute requires, before purchase money is repaid, the "surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to the land." The duplicate receipt accompanies the papers in this case, as well as properly authenticated abstract of title, but there does not seem to have been a relinquishment from the Commonwealth Title, Insurance and Trust Company of all claims to the land.

Your office decision is hereby reversed, and upon further compliance by the said company with the law as herein indicated repayment will be allowed for that part of the land embraced in Amanda Cormack's entry which was made ineffectual by the reservation for reservoir purposes.

The papers transmitted by your office letter "M," of November 16, 1897, are herewith returned.

Very respectfully,
(Signed)

THOS. RYAN,
Acting Secretary.

EXHIBIT C.

M.
J. K. M. 4–232. I. R.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 24, 1899.

THE COMMONWEALTH TITLE, INSURANCE AND TRUST CO., *Trustee,*
Care WALTER C. RODMAN, *No. 1420 Chestnut St., Philadelphia, Pa.*

SIRS: In reply to your letter of the 20th May, 1899, respecting the claim of Commonweath Title, Insurance and Trust Company of Phila., Pa., by Charles K. Zug, asst. trust officer, assignee of Amanda Cormack, for repayment of purchase money paid per Helena, Mont., C. E. receipt No. 4096, amounting to $150.00, I have to state that the papers in connection with the case were, under this date, transmitted to the Treasury Department for final settlement.

Very respectfully,

BINGER HERMANN, *Commissioner.*

14

EXHIBIT D.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
October 7, 1899.

The Auditor for the Interior Department submits the following decision for approval, disapproval, or modification:

"The facts in this case show that Amanda Cormack entered or purchased 160 acres of land at the land office at Helena, Montana, on May 9, 1890, at $1.25 per acre, $200, per receiver's receipt No. 4096, and on the next day—May 10, 1890—she borrowed $300 from the Northwestern Guaranty Loan Company, for the payment of which she gave her promissory note payable in three years and bearing 6% interest, and as security for the payment of the note at the same time she gave a mortgage on the land thus entered, which mortgage was properly recorded.

"On June 9, 1890, the Northwestern Guaranty Loan Company, in regular course of business, assigned for value the said promissory note and the security mortgage to the present claimant, the 'Commonwealth Title Insurance and Trust Company of Philadelphia,' as trustee, which assignments or transfers were properly recorded. The interest on the note was regularly paid by the maker until its maturity on May 10, 1893, after which time the principal and subsequent interest were not paid. No action was taken to collect the debt or foreclose the mortgage until after the entry of 120 acres of the land had been canceled for conflict. On August 16, 1894, the Commissioner of the General Land Office canceled the entry to 120 acres of the land for conflict, leaving 40 acres as properly purchased by and belonging to Amanda Cormack. In February, 1896, the claimant, as holder of the note and of the mortgage securing it, commenced suit in a State court to recover a judgment on the note and thus enable it to have the land security sold, the mortgage foreclosed, and the debt paid. The company got judgment on the note, and the land was ordered to be sold at public sale, and it was so sold and bid in or purchased by the claimant company, mortgagee, and the company was given a deed by the sheriff for the land so purchased, and after the time for redemption had passed the

15 court made a final decree in the matter by declaring the mortgage foreclosed and the company the owner of the land it had thus purchased. Shortly after this the claimant, as assignee of Amanda Cormack, filed with the Commissioner the present claim for repayment to it of $150, purchase money paid by said Cormack for the 120 acres of the entry which had been canceled. On October 27, 1897, the Commissioner rejected this claim for repayment for the reason that the company never owned or had any lawful title to or interest in the land, and therefore was not entitled to repayment under the act of June 16, 1880, as assignee of Amanda Cormack. The company appealed from this decision to the Secretary of the Interior, who on March 11, 1899, reversed the decision of the Commissioner and held—

"'The assignee of a mortgage is entitled to repayment where an entry is erroneously allowed and prior to its cancellation the land is mortgaged and the mortgage assigned, and after cancellation the mortgage is foreclosed and a sheriff's deed secured; but the assignee in such case should relinquish all claim to the land before repayment is allowed.'

"The claimant then executed and filed with its claim a relinquishment to the land, and the Commissioner stated and forwarded the claim to this office for payment.

"The United States has the land and the purchase money paid for it and is liable to make repayment to the person who comes within the provisions of section 2 of the act of June 16, 1880 (21 Stat., 287).

"SEC. 2. 'In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be cancelled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly cancelled by the Commissioner of the General Land Office.'

"Under this act payment can only be made to the entryman, his heirs, or assigns. The claimant in this case asks repayment as an assignee of the entryman. The question for consideration is, therefore, Is he such assignee within the meaning of the act?

16 "The uniform construction of the Secretary of the Interior and the accounting officers has been that the word 'assigns' as used in said act meant those to whom the entryman's interest in the land was conveyed prior to the cancellation of the entry. That after the cancellation the entryman had no interest in the land which he could assign, but only a simple claim against the United States for repayment and that this was not assignable, such assignment being prohibited by section 3477 of the Revised Statutes. If this be the correct view of the statute, and I have no doubt that it is, the right of the assignee must antedate the cancellation of the entry and be an assignment of the land within the meaning of the statute prior to such cancellation.

"A mortgagee has never been held to be entitled to repayment until the mortgagor's right of redemption has been extinguished. This is right, for the reason that up to this time the mortgagee is but a conditional assignee, whose right is liable to be extinguished at any time by the happening of the condition.

"The entryman, while the mortgage remains uncancelled, can not secure repayment because under regulation of August 6, 1880, if the title has not become a matter of record, he must swear that he has not conveyed or otherwise encumbered the title to the land; and if the title has become a matter of record, 'a certificate must also be produced from the proper recording officer where the land is situated, showing that said deed is so recorded and that the records of his office do not exhibit any other conveyance or incumbrance of the title to the land.' (See section 4 and 5 of regulations of A'gust 6, 1880.)

"The act of June 16, 1880, gave the Commissioner of the General Land Office power to 'make all necessary rules and issue all necessary instructions to carry the provisions of this act into effect.'

"Now, suppose the mortgagor refuses to discharge the incumbrance, is the mortgagee deprived of all remedy in enforcing his lien against the land? The right to encumber is inherent in the land itself while title is

uncancelled, and the necessity of discharging that incumbrance is made a condition precedent to payment to the entryman. Is the only protection to the lien holder under this statute a refusal to pay the entryman until he discharges the lien? I think not. He may foreclose his
17 mortgage and sell whatever right, title, and interest the mortgagor had at the date of the mortgage. The purchaser, at such mortgage sale, by virtue of such mortgage and the lien it creates, becomes vested with whatever title, right, and interest in the land the entryman was possessed of at the date of the mortgage after the time for redemption has expired under said sale. His lien has ripened into a title from the entryman as of that date, and he has become the assignee of the entryman. The conditional assignment has become absolute. The mortgage transaction has been consummated, and the title relates back to the mortgage as its source. (26 L. D., 427.)

"The cancellation of the entry does not deprive the mortgagee of his right to foreclose his mortgage and perfect his lien, whatever it may be.

"He may want to rely upon his mortgage as a source of title in an ejectment suit or in a defense to such suit to protect his lien on the mortgaged premises.

"He is a purchaser for a valuable consideration and his lien extends to all incidents to the mortgaged property. New Orleans, etc., Co. v. Montgomery, 95 U. S., 16; Northwestern Bank v. Freeman, 171 U. S., 630.

"One of the incidents of title to the property mortgaged in this claim was the right to repayment of the purchase money in case the entry was canceled. This right is the subject of sale by the entryman and follows the title to the land. If he sells the land while he has a title the right to repayment passes to the person to whom sold. If he incumbers the land this right is incumbered with it and he cannot receive repayment until he has re-vested himself with complete title by discharging the incumbrance. The holder of the incumbrance by proceeding to foreclose his mortgage lien may secure a sale of whatever vested rights or possibilities in the land title that were held by the mortgagor at the date of the mortgage and such sale after the expiration of the period of redemption would vest in the purchaser all the rights of the mortgagor at the date of the mortgage present and prospective. (Erwin v. United States, 97 U. S., 392–396.)

"Such a sale would not be repugnant to the provisions of section 3477 of the Revised Statutes. (Erwin v. United States, 97 U. S., 392; Goodman v. Niblack, 102 U. S., 556.)

"The views herein expressed are in accordance with the ruling of the Secretary of the Interior in this case and the principle announced
18 in the case of the California Mortgage, Loan and Trust Co. (on review), 26 L. D., 428, and while this office may not be bound to follow the ruling of the Secretary of the Interior as to who is an assignee, it should not refuse to do so except in cases where there is no doubt that the law has been erroneously construed. The Secretary of the Interior is the officer upon whom Congress casts the duty of making repayment. The act says 'The Secretary of the Interior shall cause to be repaid to the person who made such entry, his heirs or assigns.' Every claim must, therefore, bear the approval of the Secretary of the Interior which

presupposes something more than a mere perfunctory examination by him. It is true that he can not cause repayment to be made in any cases except those provided for by the law, but his construction as to what claims are within the law is entitled to respectful and careful consideration before his findings are overruled.

"The decisions of the Secretary of the Interior construing this statute as to repayment have ever been accepted as good authority, if not conclusive on the accounting officers. It will be found on examination of the decided cases that conflict between them is more apparent than real. In 1881 First Comptroller Lawrence held 'The word "assignee" in the statute means the party holding the legal title, or such title as the vendor can make. The right of repayment passes with and follows the legal title to the land and vests in the holder.' (Allspach case, First Comptroller's decisions, vol. 2, page 260.)

"After the mortgage is made, although a mere lien, it is the source of all future legal title so long as it subsists, and all subsequent conveyances are subordinate to it to the extent of the lien.

"If Amanda Cormack had made an absolute deed to the land subsequent to the mortgage and prior to the cancellation of the entry this would not have carried with it the right to repayment, the legal title being held subject to the mortgage.

"While the property was in that condition no payment could have been made to any one. This has been the uniform holding of the Secretary of the Interior, followed by the accounting officers of the Treasury, in settling this class of claims. It has also been uniformly held that if the holder of the legal title will secure a release of the incumbrance, though such release is given subsequent to the cancellation of the entry, he will be repaid the purchase money.

19 "If it is sound doctrine to permit and require the maker of the lien existing at the date of cancellation to extinguish it by acts done subsequent to such cancellation and by so doing secure payment, it is likewise sound doctrine to permit and require the lien holder to perfect it, and thereby secure repayment, the reason in both cases being the same, viz, the recognition of the lien as a source of title that may ripen into a legal title. 'The right of repayment passing with and following such legal title to the land and vesting in the holder.'

"This is the doctrine now held by the Secretary of the Interior. It is believed to be the correct view and that the right to a refund was covered by the mortgage lien on and foreclosure passed to the claimant by virtue of the mortgage contract and its execution. The statutes of Montana giving the right of foreclosure and sale entered into and formed a part of the mortgage contract, and when the proceedings to foreclose were completed the conditional sale under the mortgage became absolute, and the legal title of the mortgagor in the land was divested by operation of law upon the contract of mortgage, and such title extends to and covers every incident of the property from the making of the mortgage.

"I therefore find that the Commonwealth Insurance and Trust Company of Philadelphia, Pa., is the assignee of Amanda Cormack within the meaning of the act of June 16, 1880, and as such entitled to repayment."

I am unable to agree with the conclusions reached by the Auditor. Prior to the decision made in the case of the California Mortgage, Loan

and Trust Company, March 23, 1898 (26 L. D., 425), it was uniformly held by the General Land Office and by the accounting officers that the word "assigns," as used in the act of June 16, 1880 (21 Stat., 287), referred to the assignee of the land and not to the assignee of any claim on the United States for the money refunded, and that a mortgagee is not an assignee within the meaning of the act.

"A mortgagee whose claim is a mere lien on the land is not an assignee of the entryman and as such entitled to repayment." (11 L. D., 283; 15 id., 392; 24 id., 246.)

20 The instructions governing repayments issued by the Interior Department, August 6, 1880, thus specify and define those who are assignees:

"9. Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law. To construe said statutes so as to recognize the assignment or transfer of the mere claim against the United States for repayment of purchase money or fees or commissions, disconnected from a sale of the land or attempted transfer of the title thereto would be against the settled policy of the Government and repugnant to section 3477 of the Revised Statutes."

In 1881 First Comptroller Lawrence held:

"The person who has purchased the land is the assignee in law. The word 'assignee' in the statute means the party holding the legal title, or such title as the vendor can make. The right of repayment passes with and follows the legal title to the land and vests with the holder. The word 'assigns' must have been used for some purpose. It can not mean an assignee of the claim to the refund, because that claim is not per se assignable by any act of the claimant. It must needs mean, then, the assignee of the land who acquires the right of repayment by operation of the statute." (2 Lawrence, Comp. Dec., 260.)

These decisions give to the word assignee as used in the statute the sole meaning of grantee. This I conceive to have been an erroneous interpretation. Where Comptroller Lawrence got his authority to so restrict the meaning of the word "assigns" is beyond my comprehension, but this ruling has been uniformly adhered to and has become a rule of property and should not be disturbed. (4 Lawrence, Comp. Dec., 255.) It has also been uniformly held that the assignment (meaning thereby the transfer of the property, in other words, of the title) from the original entryman to the grantee, in order to constitute him the assignee

21 within the meaning of the statute must precede the cancellation of the entry. Whether this holding is right or wrong, it is also a rule of property and would preclude the assignee of this mortgage from receiving a refund of the purchase money.

Again, the mortgage is not the conveyance of title, but simply the pledge or security for a debt. From the facts stated, it is a clear legal presumption that the assignee of this mortgage had his debt satisfied by the foreclosure and the sale of the mortgaged premises. The presumption of the law is that he bid his bebt. He cannot, so long as the sale is not legally set aside, be heard to say that he did not receive by the sale

the equivalent of his bid. If title to part of the land failed because of conflict and cancellation, he should not have had his sale confirmed, but should have proceeded to have it set aside; the confirmation of the sale is the creature of his own act, and he must be content with what he gets thereunder to the amount of his bid.

Again, a mortgage being simply a security for a debt does not, per se, carry with it the right to receive a refund of the entry fee or purchase money, unless such refund is part of the security pledged. Were this not the case, then if the entry had been for 300 acres and the mortgage for 160 acres, which might just as well have been the case, the mortgage creditor would, on the execution of the mortgage, at once have acquired the right to nearly double the amount of his mortgage debt on a conflict being established.

Looking at the matter from any point of view, the assignee of the mortgage in this case is not entitled to receive the refund of the purchase money. The decision of the Auditor is therefore disapproved.

R. J. TRACEWELL, *Comptroller.*

22 *II. Amended petition. Filed October 21, 1901.*

The amended petition of The Commonwealth Title Insurance and Trust Company, trustee, assignee of Amanda McCormack, respectfully represents:

1. That the claimant is a corporation created and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, doing business in the city of Philadelphia, in said State, and as such is a citizen of the United States.

2. That on May 9, 1890, Amanda McCormack paid one hundred and fifty ($150.00) dollars to the United States at the United States land office at Helena, Montana, for the following-described land, to-wit: The E. ½ of the SE .¼ of section 21, and the NE. ¼ of the NE. ¼ of section 28, being a part of her cash entry #4096 for the E. ½ of the SE. ¼ of section 21, and the N. ½ of the NE. ¼ of sec. 28, township 20 north, range 5 east, in the Helena, Montana, land district, aforesaid; said entry as to the 120 acres first described was erroneously allowed because the said land was reserved for the Box Elder reservation system.

3. That on May 10, 1890, said McCormack obtained a loan of three hundred ($300.00) dollars from the Northwestern Guaranty Loan Company, of Minneapolis, Minnesota, and as security therefor executed and delivered to said company a mortgage deed upon the land embraced in her said entry; and that on June 9, 1890, the said company assigned said mortgage to the claimant herein, The Commonwealth Title Insurance and Trust Company.

4. That said land was sold under a decree of foreclosure dated April 29, 1896, in a suit brought by The Commonwealth Title Insurance and Trust Company, the claimant herein, to said The Commonwealth Title Insurance and Trust Company, for the sum of two hundred and thirty ($230.00) dollars, and said company received a sheriff's deed therefor.

23 5. That the Commissioner of the General Land Office on August 16, 1894, canceled the entry #4096 as to the E. ½ of the

SE. ¼ of section 21 and the NE. ¼ of the NE. ¼ of section 28, township 20 north, range 5 east, because it was in conflict with the Box Elder Reservation system, and was erroneously allowed and could not be confirmed.

6. That the claimant, The Commonwealth Title Insurance and Trust Company, applied for the repayment of the aforesaid one hundred and fifty ($150.00) dollars, which application was allowed by the Secretary of the Interior on March 11, 1899, subject to a relinquishment of said land by the claimant; that the claimant subsequently duly relinquished said land by a duly recorded deed conveying title to the United States; and that on July 24, 1899, the Commissioner of the General Land Office transmitted the papers in said case to the Treasury Department for final settlement.

7. That the Auditor of the Treasury for the Interior Department found that the claimant was entitled to the repayment of the said one hundred and fifty dollars allowed it by the Secretary of the Interior, but the Comptroller of the Treasury, on October 7, 1899, refused to pay said claim on the ground that the claimant was not entitled to a refund of the purchase money, thus attempting to overrule the decision of the Secretary of the Interior allowing such refund.

8. That by reason of the cancellation of said entry as to said land, and the refusal of the Comptroller of the Treasury to pay said claim as allowed by the Secretary of the Interior, the claimant has been deprived of the entire consideration for which the said one hundred and fifty dollars purchase money was paid to the United States, and it is therefore entitled to recover said amount upon the allowance made it by the Secretary of the Interior.

Wherefore the claimant prays judgment of this court against the United States in the sum of one hundred and fifty ($150.00) dollars.

24 THE COMMONWEALTH TITLE INSURANCE AND TRUST COMPANY, *Trustee*,
By HENRY M. DECHERT, *President*.

Attest:
W. F. KLING, *Secretary*.

THE COMMONWEALTH TITLE INSURANCE AND TRUST CO.,
Claimant.

Attorney for claimant.
Of counsel.

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

W. F. KLING, being duly sworn, says that he is the secretary of The Commonwealth Title Insurance and Trust Company, the claimant (as trustee) named in and who subscribed the foregoing amended petition; that he believes the facts stated in said petition are true, and that there is due the claimant from the United States the sum of one hundred and fifty ($150.00) dollars over and above all offsets thereto against the claimant on the part of the United States.

W. F. KLING.

Subscribed and sworn to before me this — day of October, A. D. 1901.

ANDREW T. KAY, *Notary Public*.

III. Traverse. Filed December 10, 1901.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

25 *IV. Findings of fact and conclusion of law. Filed Nov. 3, 1902.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

On October 25, 1888, Amanda Cormack made settlement on the east half of the southeast quarter of section 21 and the north half of the northeast quarter of section 28, town. 20 north of range 5 east, Helena land district, Montana, and paid therefor the minimum price of $1.25 per acre, or $200 for the 160 acres of land; and she continued to reside thereon until April 30, 1890, when she made final proof, which was accepted May 9, 1890, and final receipt and certificate were issued to her.

II.

May 10, 1890, Amanda Cormack borrowed $300 from the Northwestern Guaranty Loan Company, giving her note therefor at three years, with interest secured by mortgage on the said land, dated May 12, 1890, which mortgage was properly recorded. Thereafter, June 9, 1890, the said Northwestern Guaranty Loan Company assigned for value the note and mortgage to the Commonwealth Title Insurance and Trust Company, trustee, claimant herein, which assignment was properly recorded.

III.

January 8, 1890, the township wherein 120 acres of the land described was situate had been selected and recommended for reservoir purposes, and thereafter, July 8, 1890, the General Land Office so informed the local office. August 16, 1894, the Commissioner of the General Land Office canceled that part of the entry, to wit, 120 acres thereof, so situate which was in conflict with the Box Elder Reservation system, being all the land so entered except the northwest quarter of the northeast quarter of said section 28.

IV.

Thereafter the claimant company brought suit to foreclose said mortgage in the United States district court, eighth judicial district, of which the defendants were notified February 7, 1896, and said court, on April 29, 1896, decreed that the mortgaged premises be sold, and that out of

the proceeds of the sale the sheriff's fees, disbursements, and commissions should be paid; also the plaintiff's cost in bringing suit, amounting to $26, and the attorney's fees, amounting to $40, or in all, $385, with interest due the plaintiff. Thereafter, to wit, August 16, 1897, the mortgaged premises were sold and the claimant herein bought the whole tract of 160 acres for $230, to whom a sheriff's deed was executed in due course, about which there is no controversy.

V.

Thereafter the claimant applied to the Commissioner of the General Land Office for the repayment, to wit, of the sum of $150, being $1.25 per acre paid by said Amanda Cormack for the said 120 acres canceled, as set forth in Finding III, which was refused by the Commissioner. But on appeal to the Secretary of the Interior his decision was reversed and repayment allowed on the relinquishment by the claimant of all claim to the land so canceled.

VI.

Thereafter, to wit, July 24, 1899, the claimant having theretofore filed its relinquishment of all claim to the land so canceled, as required by the rules and regulations of the Land Office, the claim was transmitted to the Treasury Department for final settlement. The Auditor for the Interior Department of the Treasury Department passed favorably on the claim, but his decision was overruled and the claim finally disallowed by the Comptroller.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant company is entitled to recover judgment against the United States in the sum of one hundred and fifty dollars ($150).

26

V. Opinion of the court.

PEELLE, J., delivered the opinion of the court:

The claimant, as assignee of Amanda Cormack, seeks to recover repayment of the purchase money for certain lands which the General Land Office erroneously allowed to be entered and settled upon by her, and which, for that reason, could not be confirmed.

The claimant grounds its right to recover on section 2 of the act of June 16, 1880 (21 Stat. L., 287), which reads:

"In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to such land whenever such entry shall have been duly canceled by the Commissioner of the General Land Office." * * *

The land in question was entered by Amanda Cormack, in Montana, October 25, 1888, and she resided thereon from that date until April 30, 1890, when she made final proof, which was accepted May 9, following.

On the next day, May 10, 1890, she procured a loan of $300 from the Northwestern Guaranty Loan Company, and to secure the payment thereof she, on May 12, 1890, executed a mortgage on all the land so entered, which mortgage was duly recorded.

On June 9, 1890, the Northwestern Guaranty Loan Company assigned for value said note and mortgage to the claimant as trustee.

January 8, 1890, the township in which 120 acres of the land in question were situated had been selected and recommended for reservoir purposes, and after notifying the local land office thereof, the Commissioner of the General Land Office, on August 16, 1890, canceled said entry as to the 120 acres so situated.

The claimant company brought suit in the United States district court, eighth judicial district, to foreclose said mortgage, of which the defendants were notified February 7, 1896; and on April 29, 1896, a decree of foreclosure was entered, ordering the sale of the mortgaged premises to satisfy said debt and the costs of suit. On August 16, 1897, the mortgaged premises were sold, and the claimant herein bought the whole tract of 160 acres for $230, to whom a sheriff's deed was executed and delivered in due course.

Thereafter the claimant applied to the Commissioner of the General Land Office for the repayment of $150, being the purchase price of the 120 acres so held to have been erroneously entered. The Commissioner disallowed the claim, but on appeal to the Secretary of the Interior that officer reversed his decision and allowed repayment of said amount on condition that the claimant company relinquish to the United States all claim to the land so canceled.

The claimant having filed its relinquishment, as required by the rules and regulations of the Land Office, the latter did, on July 24, 1899, transmit said allowed claim to the Treasury Department for final settlement. The Auditor of the Treasury for the Interior Department favorably passed upon said claim, but his decision was overruled and the claim finally disallowed by the Comptroller.

Two questions are presented: First, Is the allowance by the Secretary of the Interior final and conclusive as to the facts and the law? Second, Is the claimant company the assignee of the original entryman within the meaning of the section of the act quoted?

In the case of Medbury v. United States (173 U. S., 492, 497), where the construction of the same section of the act of 1880 was under consideration, the court, speaking by Mr. Justice Peckham, said: "If there were any disputed questions of fact before the Secretary, his decision in regard to those matters would probably be conclusive, and would not be reviewed in any court. But where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing to make the payment is not final, and the Court of Claims has jurisdiction of such a case."

27 In view of the construction thus placed upon the act, we need not consider what analogy, if any, there is between it and Revised Statutes, section 3220, respecting the power of the Commissioner of Internal

Revenue to remit, refund, and pay back taxes erroneously or illegally assessed and collected; for while it is true the Supreme Court and this court have held that under section 3220 an allowance made by the Commissioner of Internal Revenue is, in the absence of fraud or mistake, binding on the Government and may be made the basis of an action in this court, the court, in the case cited, held otherwise in respect of the power of the Secretary of the Interior under the act of 1880, supra, i. e., where "the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing to make payment is not final, and the Court of Claims has jurisdiction of such a case." Hence it follows that, as the decision of the Secretary of the Interior in this case turns exclusively upon the proper construction of the act of Congress, such decision is open to review; and it matters not that his decision is in conformity with the law, for, being subject to review in that respect, it has not the force of an award upon which an action can be founded in this court.

The remaining question is, Is the claimant company the assignee of the original entryman within the meaning of the act? In the case of Hoffeld, executrix, etc., v. United States (186 U. S. R., 273), affirming the judgment of this court (26 C. Cls., 26), the court, in defining the word "assigns" in the section quoted, said: "'Assigns,' or, as the word is more commonly spelled, 'assignees,' are of two classes, depending upon the manner of their creation: First, voluntary assigns, who are created by act of the parties; and, second, assignees created by operation of law. Whether in a given case an assignee belongs to the first or second class depends upon the purpose for which he was created, the object to be attained by his creation, and the language of the statute or other instrument from which he derives his power. A voluntary assignee is ordinarily invested with all the rights which his assignor possessed with respect to the property, while the rights of an assignee by operation of law are such only as are necessarily incident to the complete possession and enjoyment of the things assigned. A voluntary assignee takes the property with all the rights thereto possessed by his assignor, and if he has paid a valuable consideration may claim all the rights of a bona fide purchaser with respect thereto. Upon the other hand, an assignee by operation of law—as, for instance, a purchaser at a judicial sale—takes only such title as the execution debtor possessed at the time of sale. (The Monte Allegre, 9 Wheat., 616.) The doctrine of caveat emptor applies in all its rigor, and the buyer can not set up the rights of a bona fide purchaser, even against an unrecorded deed."

Thus it was held that an assignee by operation of law, such as a purchaser at a judicial sale, took "only such title as the execution debtor possessed at the time of sale;" that in such case the doctrine of caveat emptor applied "in all its rigor;" so that the buyer at such sale could not "set up the rights of a bona fide purchaser, even against an unrecorded deed." But that ruling is not controlling in the case at bar, for the reason that when Amanda Cormack, the original entryman, on May 12, 1890, executed and delivered the mortgage to the Northwestern Guaranty Loan Company, conveying the real estate as security for the loan of $300, she thereby parted with all the right
28 title, and interest she had in the mortgaged premises, save and except her equity of redemption; and when the claimant company

acquired title by virtue of the decree of foreclosure, in which her equity of redemption was forever barred and foreclosed, the title related back to the date of the execution of the mortgage and thereby cut off all intervening rights and equities. Or, as was said by the Auditor of the Treasury for the Interior Department in passing upon this identical claim, "The holder of the incumbrance, by proceeding to foreclose his mortgage lien, may secure a sale of whatever vested rights or possibilities in the land title that were held by the mortgagor at the date of the mortgage, and such sale, after the expiration of the period of redemption, would vest in the purchaser all the rights of the mortgagor at the date of the mortgage, present and prospective."

And so in Jones on Mortgages, Vol. II, section 1654, it is said: "Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights. If all subsequent purchasers and incumbrancers are made parties to the bill, the title under the mortgage foreclosure is perfected to an absolute one. In such case the purchaser acquires the title of the mortgagee, and also the title of the mortgagor as it stood at the time of the making of the mortgage." And further, "the mortgagor is estopped from denying the title he has set forth in his mortgage." (Vallejo Land Association v. Viera, 48 Cal., 572.) This may be said to be the general rule, for the support of which no other authorities need be cited.

Therefore, on failure of the mortgagor's title by reason of the erroneous entry and as incident to the land so mortgaged as security, the claimant company acquired, under the act of 1880, the right to the repayment of the purchase money.

The act itself recognizes the right of the entryman to assign his right and interest in the land before confirmation of his entry, i. e., "where from any cause the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns," the purchase money, etc., though that right, in the absence of any statute to the contrary, is inherent in the ownership of the land or of any interest therein. Had the claimant conveyed the land by deed instead of by mortgage, there could be no question as to the grantee's right to the repayment of the purchase money on failure of the grantor's title by reason of the erroneous entry; or, as was said by the court in the case of Hoffeld (supra), in speaking of one who seeks a right under a statute, he "must bring himself clearly within its equity as well as within its letter, and must show himself entitled not only to the land itself, but to everything which the statute has annexed thereto as an incident."

When "the entry has been erroneously allowed and can not be confirmed" the right to repayment of the purchase money accrues "to the person who made such entry, or to his heirs or assigns." Clearly the word "assigns" has reference to the assignee of the land, whether the title or interest therein be acquired by deed or through a mortgage, for in either case the conveyance is by the voluntary act of the entryman; and to hold that after such conveyance a claim to repayment of purchase money would accrue to the entryman instead of his assignee, under such circumstances, would be aiding him to defraud his creditors, to which the Government would be a party.

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29 True, the court, in the case of Hoffeld (supra), said: "The right to a return of the purchase money is in no sense an incident to the land and did not pass to the purchaser upon the sale under the execution." But that was said with reference to a sale of real estate on execution, where the execution debtor had not voluntarily assigned his right, title, or interest in the land; and having done no act which carried with it either the land or the right to the repayment of the purchase money, the entryman's right to repayment was not divested by such sale. In other words, he had not voluntarily assigned or transferred his right or title to the land when the entry was found to have been erroneously allowed, and hence he stood, in respect of the right to repayment, in the same position he would had no sale of the land on execution taken place.

The purchaser in that case became the assignee by operation of law, and therefore took, as the court said, "only such title as the execution debtor possessed at the time of sale;" while the right to the repayment of the purchase money did not become consummate until the cancellation of the entry seven years later; and as the entryman had done no act which carried with the land the right to the repayment of the purchase money, he remained the owner of the claim. But whether such claim, independent of the land, could have been assigned by him so as to vest in his assignee as against the Government the right to prosecute such claim, or whether in that respect the act of 1880, recognizing assignees, has the effect to repeal or suspend Revised Statutes, section 3477, prohibiting the voluntary assignment of claims, is not material to this case, except by way of argument to show the contrast, i. e., that by the execution of the mortgage the entryman did perform a voluntary act which carried with the land the right to the repayment of the purchase money on failure of the entryman's title, which right became consummate in his assignee upon the decree of foreclosure and sale, as by such proceedings and sale not only was the entryman's equity of redemption forever barred and foreclosed, but the purchaser's title related back to the date of the mortgage, thereby including all the right, title, and interest of the mortgagor at that date, one of which was the right to the repayment of the purchase money on failure of title by reason of an erroneous entry.

True, the mortgagor's equity of redemption was barred and foreclosed by virtue of the decree of foreclosure and sale, if it had not previously been extinguished by the cancellation of the entry, but by his voluntary act he had consented that on failure to pay his equity of redemption might be barred and foreclosed. And, furthermore, it was by virtue of the mortgage and not the foreclosure and sale that constituted the claimant company his assignee. In other words, by virtue of the mortgage the claimant company became the assignee of the entryman, and assuming that notwithstanding the cancellation of his entry as to the 120 acres it became necessary to foreclose the mortgage, it was not for the purpose of acquiring the rights of an assignee in respect to the repayment of the purchase money, but to bar the entryman's equity of redemption in and to the mortgaged premises. That done, the mortgagee's right to receive payment was complete as required by the rules and regulations of the Department.

The cancellation of the entry subsequent to the execution of a mortgage would not have the effect to deprive the mortgagee of the
30 right to foreclose his mortgage; and while after cancellation there seems to be little reason why the mortgage should be foreclosed, as to the 120 acres, still under various decisions of the Land Office it has been held, in substance, that a mortgagee prior to a decree of foreclosure and sale is not an assignee, thereby requiring such foreclosure, in order to bar the mortgagor's equity of redemption, which latter has been done in this case.

In speaking of the construction of the act by the Secretary of the Interior and of the accounting officers, the Auditor of the Treasury for the Interior Department, who is familiar therewith, said in passing on the present claim: "The uniform construction of the Secretary of the Interior and the accounting officers has been that the word 'assigns' as used in said act meant those to whom the entryman's interest in the land was conveyed prior to the cancellation of the entry. That after the cancellation the entryman had no interest in the land which he could assign, but only a simple claim against the United States for repayment, and that this was not assignable, such assignment being prohibited by section 3477 of the Revised Statutes. If this be the correct view of the statute, and I have do doubt that it is, the right of the assignee must antedate the cancellation of the entry and be an assignment of the land within the meaning of the statute prior to such cancellation." Furthermore, he said: "The entryman, while the mortgage remained uncanceled, can not secure repayment, because under Regulations of August 6, 1880, if the title has not become a matter of record he must swear that he has not conveyed or otherwise encumbered the title to the land, and if the title has become a matter of record, 'a certificate must also be produced from the proper recording officer where the land is situated showing that said deed is so recorded, and that the records of his office do not exhibit any other conveyance or incumbrance of the title of the land.' See sections 4 and 5 of Regulations of August 6, 1880."

As has been frequently held by the Supreme Court, the construction of a statute by the head of an executive department charged with its execution is entitled to great weight, and in case of doubt controlling. In our view of the statute the ruling of the Secretary of the Interior in allowing repayment to the claimant as assignee was correct both in principle and on authority. The Government received the money for the land under a statute which created in the entryman, his heirs or assigns, a right to the repayment of the purchase money if from any cause the entry had been erroneously allowed and could not be confirmed; and the entry for that reason having been canceled, thereby depriving the claimant company of its security, the court holds that by the execution of the mortgage so conveying the land the right to the repayment of the purchase money thereby accrued to the mortgagee, who, having foreclosed the equity of redemption of the mortgagor, is entitled, as such assignee, to the repayment of the purchase money, and judgment will be entered accordingly.

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31 *VI. Judgment of the court.*

THE COMMONWEALTH TITLE INSURANCE AND Trust Company, Trustee, *vs.* THE UNITED STATES. } No. 23414.

At a Court of Claims held in the city of Washington on the 3d day of November, 1902, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the claimant, The Commonwealth Title Insurance and Trust Company, trustee, do have and recover of and from the United States the sum of one hundred and fifty dollars ($150).

BY THE COURT.

32 *VII. Application for and allowance of appeal.*

THE COMMONWEALTH TITLE INSURANCE AND Trust Company, Trustee, *vs.* THE UNITED STATES. } No. 22414.

From the judgment rendered in the above-entitled cause on the third day of November, 1902, in favor of the claimant, the defendants by their Attorney-General, on the first day of December, 1902, make application for and give notice of an appeal to the Supreme Court of the United States.

L. A. PRADT,
Assistant Attorney-General.

Filed December 1, 1902.

Ordered, That this application for appeal be allowed as prayed for.

BY THE COURT.

DECEMBER 1, 1902.

33 Court of Claims.

THE COMMONWEALTH TITLE INSURANCE AND Trust Company, Trustee, *vs.* THE UNITED STATES. } No. 22416.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the judgment of the court, of the application for, and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17th day of December, A. D. 1902.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 18755. Court of Claims. Term No. 172. The United States, appellant, vs. The Commonwealth Title Insurance & Trust Company, trustee. Filed December 18, 1902.